Supreme Court, U.S.
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No. 01-178

In The

SUPREME COURT OF THE UNITED STATES

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Petitioner,

v.

OKLAHOMA GAS AND ELECTRIC COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should deny a petition for *certiorari* that is based on a strained interpretation of isolated phrases in the Court of Appeals' opinion, where: (i) the court correctly stated the controlling legal standard for state action antitrust immunity and correctly applied that standard to the facts based on its review of the entire record, (ii) the court's decision is not in conflict with a decision from any other Circuit, and (iii) further review would not change the result because this Court likely would affirm on other dispositive grounds, including *Noerr-Pennington* immunity, the filed-rate doctrine and petitioner's failure to prove antitrust injury or a legally relevant product market.

CORPORATE DISCLOSURE STATEMENT

Oklahoma Gas and Electric Company ("OG&E") is a wholly-owned subsidiary of OGE Energy Corp. OGE Energy Corp. is an Oklahoma corporation which is headquartered in Oklahoma City. OG&E Energy Corp.'s stock is publicly traded on the New York Stock Exchange and the Pacific Exchange.

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NOTE ON CITATIONS

- Citations to the Tenth Circuit's Opinion are to the Opinion as reproduced in Appendix A to Trigen's Petition and appear as "Op." followed by the page number in Trigen's Appendix, *e.g.*, "Op. 5a."
- Citations to Trigen's Petition appear as "Pet.", followed by the relevant page number, *e.g.*, "Pet. 5."
- Citations to the Appendix in the Tenth Circuit appear as "A" followed by the volume and page number of the Appendix, *e.g.*, "A.III.478."
- Citations to trial exhibits are in the format, *e.g.*, "PX 5" or "DX 5." The trial exhibits were included in a four volume separate Addendum filed in the Court of Appeals.

JURISDICTION

Trigen timely invokes this Court's jurisdiction under 28 U.S.C. § 1254 to review the Tenth Circuit's decision concerning Trigen's federal antitrust claims. The Court of Appeals correctly held that there was no federal subject matter jurisdiction over Trigen's state-law claims because they were collateral attacks upon tariffs, and thus within the exclusive jurisdiction of the Oklahoma Corporation Commission ("OCC"). That decision is not comprised within the question presented by Trigen in its petition for *certiorari*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent Oklahoma Constitutional and statutory provisions are reproduced at Appendix A.

STATEMENT OF THE CASE

Trigen sued Oklahoma Gas and Electric Company ("OG&E") for antitrust and tort damages, claiming that Trigen lost business and had to reduce its prices because OG&E tried to sell three customers more electricity at state-regulated rates. Based on irrelevant evidence and erroneous instructions, the jury was permitted to award Trigen over $20 million in damages, after trebling. Having reviewed the entire record, the Court of Appeals for the Tenth Circuit reversed the antitrust judgment on state action immunity grounds. The court found that "OG&E is selling only one thing – electricity at state-regulated rates" (op. 11a), and that all of OG&E's sales of electricity were subject to comprehensive regulation and active supervision by the State of Oklahoma. The Court of Appeals rejected each reason Trigen offered as to why the state action doctrine should not apply. The Court also determined that Trigen's state antitrust and tortious interference claims were veiled attempts to collaterally attack OG&E's filed rates, which were within the exclusive jurisdiction of the OCC.

The Tenth Circuit's opinion represents a standard application of the established state action antitrust immunity doctrine. Contrary to Trigen's unsupported charges, the decision below will not impede the States' ability to deregulate electric utilities or other industries. Trigen fails to present an issue worthy of the extraordinary remedy afforded by the grant of a writ of *certiorari*.

OG&E's Regulated Electricity Sales And Trigen's Unregulated Cooling Services

OG&E's retail electricity sales in Oklahoma are pervasively regulated by the OCC, an agency established by the State Constitution. Okla. Const. art. IX § 15. The Oklahoma Constitution mandates a comprehensive regulatory structure, providing that "[t]he authority of the Commission [OCC] . . . to prescribe rates, charges, and classifications . . . for . . . transmission companies, shall . . . be paramount." *Id.* § 18. The OCC's decisions are appealable only to the Oklahoma Supreme Court, and may not be "questioned" in any other court. *Id.* § 24. The OCC is responsible for "general supervision over all public utilities, with power to fix and establish rates and to prescribe and promulgate rules . . . affecting their services, operation, and the management and conduct of their business. . . . " 17 Okla. Stat. § 152(A). The OCC's regulatory authority extends to all uses of "electric current for light, heat or power." *Id.* § 151(c).

Trigen sells heating and cooling services to customers in Oklahoma City by pumping steam and chilled water from Trigen's central plant through Trigen's underground pipeline system. Trigen's rates are not regulated.

Buildings in Oklahoma City can be cooled through the use of Trigen's services or through installed air conditioning equipment ("chillers") powered by OG&E's electricity. OG&E sells more electricity to customers with on-site chillers than it does to its customers that use Trigen's cooling services. OG&E does not sell chillers. Without a chiller, OG&E's electricity is not a substitute for Trigen's

district-cooling system. OG&E does not control its own electricity prices: the OCC controls all prices for retail electricity. Nor does OG&E control the prices of chillers: those prices are set by third-party cooling equipment manufacturers.[1]

The Three Competitive Incidents At Issue

Trigen sought and was awarded damages at trial for OG&E's efforts to sell electricity, at OCC-approved rates, in "three allegedly anticompetitive incidents." Op. 4a. The first incident for which Trigen sought damages involved OG&E's efforts to persuade the County to install on-site chillers and purchase more electricity to cool the Oklahoma County jail and complex, which was cooled by Trigen's piped-in chilled water. Trigen had to offer the County a lower price in order to keep the County's business. The Court of Appeals described the competition for the County buildings:

> First, Trigen and OG&E competed for Oklahoma County's buildings. The County had originally signed a contract with Trigen in December 1989. However, this contract lapsed at the end of every fiscal year, as the Oklahoma Constitution prohibits political subdivisions from entering into contracts exceeding one fiscal year. I Aplt. Sep. Add. Ex. 85, ¶¶ 2-3. In 1993, the County Board became dissatisfied with Trigen's rates and began to investigate installing on-site electric chillers. OG&E conducted a study for the County that concluded the County could save significant amounts of money by installing on-

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[1] As Trigen points out (pet. 2), OG&E's employees drafted a "Plan of Action" (PX 164) as to methods OG&E might employ to persuade customers that operating electric chillers is more economical than Trigen's system. Contrary to Trigen's mischaracterization, OG&E's Plan was procompetitive: it encouraged competition based on price and service. OG&E's "Plan of Action" is attached as App. D.

> site chillers. Convinced by the study, the County Board began negotiations with Trigen, with Trigen ultimately agreeing to reduce the County's capacity charge by about $200,000 annually. At trial, Trigen sought to regain these "lost profits" as damages from OG&E. Aplt. Br. at 17-18; Aplee. Br. at 5-7.

Op. 4a. The jury awarded Trigen "antitrust" damages assuming twenty years of "lost profits" purportedly suffered when Trigen lowered the price of its cooling services to Oklahoma County in response to OG&E's marketing efforts.

In the second alleged incident, Trigen sought damages for the Oklahoma City government's decision to use on-site chillers to cool the City's Myriad Convention Center ("Myriad"). The Court of Appeals explained this incident:

> Second, OG&E and Trigen competed to win the contract to serve the City's Myriad Convention Center. The City ultimately selected OG&E, after OG&E offered to include the City in the experimental Real Time Pricing ("RTP") tariff recently approved by the OCC. Aplt. Br. at 18. Under the RTP tariff, the customer is given a schedule of hourly prices a day (or a week) in advance, and the customer may adjust its usage accordingly. *Id.* at 20. The OCC's approval of the RTP program gave OG&E complete discretion to select customers. *Id.* An outside consulting firm, hired by OG&E, estimated (but did not guarantee) that by using RTP, the City could achieve an average rate of 1.8 cents per kilowatt-hour. *Id.* at 21. Trigen contends that OG&E misrepresented the RTP rate to the City. Aplee. Br. at 32-36.

Op. 4a. The Tenth Circuit rejected Trigen's premise that OG&E had misrepresented the RTP tariff:

> OG&E has no discretion in setting its electricity rates. The RTP rate is governed by strict formulas defined in the OCC-approved tariff. Aplt. Reply Br. at 7. Under the RTP program, the

> *customer* is given discretion in determining his electricity rate by determining at what times of the day to use electricity. Accordingly, OG&E could only offer the City an *estimate* put together by an outside consulting firm, based on certain assumed usage patterns.

Op. 12a.[2] Again, Trigen sought from OG&E, and the jury awarded, the "lost profits" Trigen claimed it would have earned if it had continued to serve the Myriad for 20 years.

The Court of Appeals also described the third allegedly anticompetitive incident, involving a privately owned building called Corporate Tower:

> Third, and finally, OG&E and Trigen competed for the business of Corporate Tower, a non-governmental building. Trigen succeeded to the Corporate Tower contract when it entered the Oklahoma City market in 1989. Corporate Tower's contract with Trigen had a primary term of ten years, with two five-year renewal periods. Aplt. Br. at 25; II Sep. Add. Ex. DX 5A at ¶ 2. The first of these renewal periods expired in September 1995. In anticipation of that expiration, OG&E attempted to persuade Corporate Tower to install an on-site cooling system. To this end, OG&E provided information to the building manager on how to evaluate on-site cooling, offered to pay for a feasibility study, sponsored an informational breakfast meeting and an energy conference, and had its lawyers evaluate Corporate Tower's contract with Trigen for legal termination options. Aplt. Br. at 24-26.

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[2] The experimental RTP tariffs allowed OG&E to offer large users lower electricity rates based on marginal costs. A copy of the Day-Ahead tariff (DX 330), which is exemplary, is attached as App. B. The OCC's Final Order approving OG&E's RTP pilot program, a copy of which is attached as App. C, states: "The proposed Day-Ahead and Week-Ahead Pricing Tariffs will not result in unjust or undue discrimination." App. C at c-5.

> Corporate Tower decided to terminate its relationship with Trigen at the end of the first contract-renewal period and install on-site chillers and heaters. At trial, Trigen sought to recover twenty years of lost profits from the loss of Corporate Tower's business based on the assumption that, but for OG&E, Trigen would have received a twenty-year contract extension. *See* I Sep. Add. Ex. PX 515.

Op. 4a-5a.

The Tenth Circuit's Opinion

The Court of Appeals stated and applied the two-pronged test for state action immunity spelled out by this Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Op. 8a-13a. Applying *Midcal* to the facts at hand, the Court of Appeals specifically found that the State of Oklahoma has (1) manifested a clearly articulated policy to displace competition with regulation of electricity sales (op. 9a-10a), and (2) through the OCC, the State actively supervises OG&E's electricity "rates . . . services, operation and management." Op. 10a, 12a-13a.

In finding OG&E's activities immune under *Midcal*, the Court of Appeals expressly rejected Trigen's purported "cooling services" product market definition. Trigen's market definition could not be relevant because "OG&E is selling only one thing – electricity at state-regulated rates" and OG&E "does *not* sell the electric chillers that are necessary for cooling." Op. 11a. Obeying this Court's ruling in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court of Appeals rejected Trigen's contention that allegations of improper conduct by OG&E ousted the state action immunity for which OG&E's tariffed electricity sales qualify. Op. 10a-11a. The Court of Appeals observed that "the heart of Trigen's complaint is that OG&E's rates are too low and that Trigen either had to lower its own rates in response or lose business" (op. 14a), and found that Trigen's state

law claims were nothing more than "collateral attacks on OG&E's filed rates." Op. 13a-14a. Because "Oklahoma law subjects all grievances with tariffs to the exclusive jurisdiction of the OCC," these state law claims also were dismissed. *Id.*

SUMMARY OF ARGUMENT

The decision below stands for the unremarkable proposition that a state-regulated utility's sales of its state-regulated product at state-regulated prices enjoy state action immunity from the Sherman Act. Not surprisingly, there is no split in the Circuits on this uncontroversial issue. Nor does the decision below conflict with this Court's precedents. Accordingly, the petition should be denied.

The Court of Appeals, like Trigen, relied on *Midcal*, 445 U.S. 97, to state the standard for state action immunity. Op. 8a; Pet. 5, 12. The two-pronged *Midcal* standard, as advanced both by Trigen and the Court of Appeals, immunizes conduct by private actors only where there is a clearly articulated state policy to displace competition with regulation, and active state supervision. The Court of Appeals clearly announced that it would apply the strict *Midcal* standard based upon its *de novo* review of the entire record and, in particular, the evidence regarding Oklahoma's regulatory scheme and the OCC's active supervision of OG&E's conduct. Op. 6a-13a. Because Trigen's petition "assert[s] error consist[ing] of . . . the misapplication of a properly stated rule of law," to facts unlikely to be repeated in other cases, it does not warrant this Court's review. *See* Sup. Ct. R. 10.

Trigen ignores the Tenth Circuit's careful *Midcal* analysis and instead strains interpretation of isolated phrases in the opinion to argue that the Court of Appeals expanded the state action immunity doctrine by applying it based only on OG&E's "status" as a regulated utility. Pet. 2, 5-6, 7, 12, 14, 17. However, even a cursory review of the opinion reveals that the Court of Appeals applied

appropriate standards enunciated by this Court in *Midcal*, as well as *FTC v. Ticor Insurance Co.*, 504 U.S. 621 (1992), and *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), and did not alter the current formulation of the state action immunity doctrine. Op. 6a-10a.

In the end, Trigen is left only with its mantra that OG&E "monopolized" the "cooling services market" by engaging in "non-price predation". But this mantra is baseless. First, the Court of Appeals found Trigen's definition of the "cooling services market" to be fatally flawed. Trigen's own expert conceded that OG&E's electricity, alone, is not interchangeable with Trigen's cooling services: "If there is no chiller there, I am not going to get any air conditioning." A.IX.2359. Notwithstanding its own expert's testimony, Trigen's market definition and market share analysis conveniently ignored the substantial costs (and even the need) to purchase and install chilling equipment. Accordingly, the Court of Appeals properly rejected as "unreasonable" Trigen's illogical and economically unrealistic product market. Op. 11a.

Secondly, the "non-price predation" element of Trigen's mantra also fails. OG&E's conduct actually resulted in *lower* prices to the City, County and Corporate Tower. As to "each of the three competitive incidents of which Trigen complains," the Court of Appeals determined that "the heart of Trigen's complaint is that OG&E's rates are too low and that Trigen either had to lower its own rates in response or lose business." Op. 14a. In other words, all of OG&E's activities which Trigen calls "predatory" are more properly characterized as price competition. "[P]rice competition is not predatory activity." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 118 (1986).[3]

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[3] *See, e.g.*, Pet. 1, 3, 4, 7, 9, 14, 15, 16, 18. The "predatory" and "anticompetitive" misnomers appear dozens of times in Trigen's petition. Trigen also mischaracterizes OG&E's conduct when it labels it "exclusionary." Pet. 2. The "exclusionary"

While Trigen was able to persuade the jury with its unsubstantiated allegations that OG&E had committed various acts tantamount to political corruption, the Court of Appeals found that OG&E's attempts to sell electricity to local governments were not actionable under federal antitrust laws. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 378-79 (1991). The Court of Appeals properly found that none of the "bad" acts alleged by Trigen could nullify the state-action immunity for OG&E's efforts to sell more electricity at rates and on terms regulated by the OCC. Op. 11a.

Perhaps recognizing the defects in the facts and theory of its case, Trigen's principal argument for granting the writ is that the Tenth Circuit's opinion may somehow impede the States' deregulation of electric utilities and other industries. Pet. 6-12. The argument is premised on Trigen's intimation that deregulation is imminent. But the argument has no foundation in this case, because OG&E was and remains subject to pervasive and actively-supervised State regulation. Indeed, as Trigen concedes (pet. 9 n.8), Oklahoma recently postponed any plan to deregulate retail electricity sales. The decision below involves regulation, not deregulation, and will have little relevance to future cases in deregulated industries. Trigen's policy arguments raise no issue worthy of this Court's attention.

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conduct of which Trigen complained at trial was OG&E's refusal to enroll Trigen in the RTP program. Trigen labeled this as "discriminatory" even though the OCC expressly directed OG&E to select customers for the experimental rate and the OCC expressly found that the tariff was not discriminatory. *See, e.g.*, DX 318, OCC Final Order, App. C at c-5.

REASONS TO DENY THE WRIT

I. Trigen's Petition Should Be Denied Because The Tenth Circuit Correctly Applied Supreme Court Precedent When It Held That Trigen's Claims Were Barred Under The State Action Doctrine.

The Court of Appeals' opinion is a straightforward application of state action antitrust immunity to the pervasively regulated and actively supervised efforts of a utility company to sell its product – electricity – at state-mandated rates. The Court of Appeals' statement of the controlling standard for applying the state action immunity doctrine is correct, and is not disputed by Trigen:

> The state action doctrine arises from *Parker v. Brown*, 317 U.S. 341, 350-52 (1943), in which the Supreme Court relied on principles of federalism and state sovereignty to hold that the Sherman Act was not intended to prohibit states from imposing restraints on competition. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court set forth a two-pronged test for determining when private parties regulated by the state are shielded from the federal antitrust laws. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," *id.* at 105 (internal quotations and citation omitted), and second, "the policy must be 'actively supervised' by the State itself."

Op. 8a. The Court of Appeals reviewed the state action immunity issue *de novo* (*id.*), after "review of the entire record" (op. 7a), and held that the *Midcal* standard was satisfied:

> Because Oklahoma has clearly articulated a policy to displace competition with the regulation of electric utilities and because Oklahoma actively supervises any allegedly anticompetitive conduct, the state action doctrine immunizes OG&E's regulated electricity sales from federal antitrust scrutiny.

Op. 8a.[4] Trigen overlooks both the court's correct statement of the *Midcal* test and the several pages of the opinion explaining the court's reasons for its holding. Op. 8a-11a. Instead, Trigen posits an artificial reading of the opinion to argue that the court broadened state action immunity by imposing a new "status" test. Pet. 2, 5, 6, 7, 14, 17. In reality, the Court of Appeals' decision did not turn on the status of the electric utility, but rather on the facts and circumstances of the case under the proper legal standard stated in *Midcal*.

A. The Court Of Appeals Properly Held That The State Of Oklahoma Has A Clearly Articulated Policy To Replace Competition With Regulation Of Electric Services.

As explained in the Statement of the Case, *supra* at 2-3, the Oklahoma Constitution and Statutes confer on the OCC "paramount" authority to regulate all of the rates and charges for electric services (Okla.Const. art. IX § 18), as well as the management and conduct of business of electric utilities. 17 Okla.Stat. § 152(A); § 151(c). The Court of Appeals determined that the State of Oklahoma's pervasive regulatory structure exhibits a clearly articulated policy to displace competition in electric service within the meaning of *Midcal*'s first prong.

The Tenth Circuit's decision in this case is consistent with that court's previous examination of Oklahoma's regulatory structure for electric utilities in *Lease Lights v. Public Service Co. of Oklahoma*, 849 F.2d 1330 (10th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989). In *Lease Lights*, the Court of Appeals held that the OCC's approval and monitoring of the electric utility's rates satisfied both prongs

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[4] Indeed the court stated and applied the strictest possible standard for state action immunity. As explained infra at 19-20, because the competitive incidents in question involved City and County decisions, the less stringent test under *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), might have been applied.

of the *Midcal* test, even though the low rate allegedly "destroyed" competitors in the outdoor lighting market. 849 F.2d at 1334-35. After taking a fresh look at the issue in this case, the Court of Appeals concluded that the same clearly articulated State policy to displace competition with regulation of electricity sales applies here.

B. The Court Of Appeals Properly Held That The OCC Actively Supervises OG&E's Electricity Sales And Marketing Activities.

The record reviewed by the Tenth Circuit showed active supervision by the OCC. The OCC's review and approval, or denial, of electric rates in Oklahoma is detailed, deliberate and judicious, with the public interest of paramount importance. The process regarding the Real Time Pricing ("RTP") tariffs is of particular interest, both because OG&E's use – or alleged misuse – of those tariffs is pivotal to Trigen's theory, and as an example of the OCC's active and detailed supervision of the services offered by OG&E.

The OCC approved OG&E's two RTP tariffs as an experimental pilot program on May 24, 1996, in Final Order No. 402103, after a four-month process culminating in a public hearing. The OCC's Final Order created a two-year period for OG&E to enroll participants in the four-year pilot program, and required OG&E to submit detailed quarterly reports of OG&E's experience with RTP tariffs. OG&E complied, and its reports concerning its experience with RTP were put into evidence at trial. *See* App. C at c-6; A.XII.3101-03; DX 358, DX 363, DX 367, DX 371, DX 372.

Indeed, Trigen has participated in the OCC's active supervision of OG&E, by actively taking part in the OCC's protracted review of OG&E's rates in 1996 and 1997. In the 1996-97 rate case, Trigen raised with the OCC

concerns similar to those at issue in this case regarding the RTP tariffs and OG&E's use of the tariffs.[5]

At a January 22, 1996 public OCC hearing in the rate case, Trigen's attorney, Bernays Barclay (who also appears on the petition as one of Trigen's counsel) stated:

> Last Spring when they [OG&E] got the real time pricing program through in a few months, Trigen was asleep at the switch. We failed to warn you how that program could be misapplied to make other ratepayers pay for OG&E's naked promotional use of a rate that was supposed to be for conservation and load management. Then within hours of its approval, it offered it to the city for just that purpose. That woke Trigen up, and here we are. We don't want that to happen again.

Tr. of Proceedings, January 22, 1996, Oklahoma Corporation Commission, P.U.D. No. 960000116, at 10-11.

In its February 11, 1997 Order approving the Joint Stipulation and Settlement Agreement in the rate case, the OCC specifically rejected Trigen's position on the RTP tariffs:

> The Commission further finds that the rate reduction set forth in the Stipulation represents a balance of the competing interests of all of the Company's classes of customers. In that connection the Commission notes that all of the Company's classes of service were represented by signatories to the Stipulation. . . . Furthermore, intervenor Trigen has presented this Commission with no evidence to support its assertion that the tariffs proposed for these riders contain provisions which are unduly discriminatory on

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[5] In its unsuccessful Petition For Rehearing *En Banc* in the Tenth Circuit, Trigen referred to proceedings in the rate case. Trigen neglected to advise the Court of Appeals that the OCC considered and rejected Trigen's similar allegations in that proceeding.

> their face. Therefore, the Commission finds that the specific relief requested by Trigen is not supported by substantial evidence. Notwithstanding this finding, however, as will be reflected below, the Director, Public Utility Division for this Commission, shall provide all parties to this proceeding with an opportunity to review the final tariffs implementing the Stipulation before they are accepted for filing.

Oklahoma Corporation Commission Order No. 409383, P.U.D. No. 960000116 (February 11, 1997), at 9-10.

Trigen actively intervened and raised its concerns regarding the RTP tariffs and OG&E's use of the tariffs in the 1996 rate proceeding (which lasted over one year).[6] These facts belie Trigen's assertion that the OCC does not actively supervise OG&E's rates.

C. The Court Of Appeals' Decision Is Consistent With *Ticor, Patrick,* And *Cantor.*

Trigen relies heavily on this Court's decision in *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992), to argue that state action immunity does not exist. However, *Ticor* stands in sharp contrast to the facts of this case. In *Ticor,* the Federal Trade Commission alleged concerted action by multiple parties: specifically, horizontal price fixing for title services by six of the nation's largest title insurance companies. In *Ticor,* this Court reviewed a Third Circuit decision which suggested that the active supervision prong of *Midcal* was satisfied by the mere existence of a state program that provided an opportunity for supervision. 504 U.S. at 637. This Court rejected the Third

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[6] As a result of the 1996-97 rate case, OG&E's rates were lowered substantially. Due to the rate reduction supervised and approved by the OCC, OG&E's rates remain 6 percent below the regional average and 20 percent below the national average. Edison Electric Institute *Amicus Curiae* Brief filed in the Court of Appeals, at 4 (citing OG&E Energy Corp. Annual Report (1999) at 3).

Circuit's formulation as insufficient to "determine whether the State has exercised sufficient independent judgement and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Id.* at 634-35. "The mere potential for state supervision is not an adequate substitute for a decision by the State." *Id.* at 638.

In contrast, Oklahoma's regulatory regime offers much more than a mere opportunity for state supervision of OG&E's rates. Consistent with *Ticor*, the Tenth Circuit carefully examined the record and determined that the OCC actively supervises OG&E's activities. Op. 8a-10a, 12a-13a. For example, rejecting Trigen's argument that OG&E (and not the State) had the power to determine the RTP rate, the Court of Appeals found that "OG&E has no discretion in setting its electricity rates. The RTP rate is governed by strict formulas defined in the OCC-approved tariff." Op. 12a; *also see* App. B at b-7 – b-9. As explained above, Trigen has publicly acknowledged before the OCC that it had the opportunity to participate in this rate-setting process, but "Trigen was asleep at the switch." *See supra* at 13. Trigen's contention that the OCC does not actively supervise OG&E "is ludicrous, almost to the point of frivolity." *DFW Metro Line Services v. Southwestern Bell Telephone Corp.*, 988 F.2d 601, 607 (5th Cir. 1993) (active supervision requirement satisfied where plaintiff had already filed a challenge before the Public Utility Commission).[7] Not only is this case factually

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[7] The remaining cases upon which Trigen relies, pet. 16 n.13, are inapposite. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), held that a home rule statute granting a municipality very broad authority to self-govern was not a "clearly articulated policy" to permit anticompetitive conduct in a cable television market. *Cost Management Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 942 (9th Cir. 1996) held that there was no state action immunity where a utility violated the very tariff provisions upon which it relied, by

distinguishable from *Ticor*, but the Court of Appeals strictly abided by the legal principles announced in *Ticor*.

Trigen's reliance on *Patrick v. Burget*, 486 U.S. 94 (1988), is similarly misplaced. In *Patrick*, the Oregon Board of Medical Examiners terminated the plaintiff physician's privileges to practice medicine due to substandard care. *Id.* at 97. Patrick filed a Sherman Act suit. This Court determined that the State's statutory authority was limited to reviewing a hospital's peer review *procedures;* but not the actual *decisions* of the peer review committee. *Id.* at 102. Because the restraint in *Patrick* consisted "not in the procedures used to terminate hospital privileges, but in the termination of privileges itself," *id.*, this Court found that state action immunity did not apply.

Here, however, there are no similar limits on the OCC's authority. The OCC has jurisdiction over both procedure and substance. It has statutory authority to promulgate rules and regulations affecting OG&E's services, establishes all of OG&E's electricity rates, and has exclusive jurisdiction over claims directly (or, as in this case, collaterally) challenging OG&E's rates.

Trigen also relies on *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), but to no avail. In *Cantor*, a retail druggist selling light bulbs filed suit, claiming that the local electric utility had violated the Sherman Act by giving light bulbs away without charge. As the Court of Appeals correctly explained:

> In *Cantor*, the Court held that a Michigan electric utility's program distributing free light bulbs was not immune from the Sherman Act, even though the light-bulb-distribution program was included in the state-approved tariff, because there was no evidence that the state

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offering "off-tariff" pricing. The Oklahoma Constitution and Statutes empowering the OCC specifically authorize regulation and are not municipal "home rule" provisions. Nor does this case involve deviation from any tariff.

> intended to regulate the electric light bulb market. [428 U.S.] at 598. *Cantor* involved an electric utility that was distributing an unregulated product – light bulbs. OG&E has done no such thing. OG&E only sells electricity at state-regulated rates.

Op. 11a-12a (footnote omitted). Unlike the utility in *Cantor*, however, OG&E was not selling or distributing any product in "competitive areas of the economy," but was only attempting to market and sell one product, electricity, its core, comprehensively regulated business product.[8]

Despite the doctrinal consistency and the factual differences between the Court of Appeals' decision and this Court's decisions in *Ticor, Patrick and Cantor*, Trigen relies on mischaracterizations and wordplay to urge this Court to review the Court of Appeals' decision. For example, Trigen claims that the Court of Appeals created what Trigen calls "status-based" immunity, because it "never considered whether Oklahoma actively supervised" the challenged conduct. Pet. 15. *See also* pet. 15-16 n.12 (claiming that the Court of Appeals "did not require *any* supervision in fact"). In fact, as we have seen, the Court of Appeals did find that the OCC "actively supervised" OG&E's activities. Furthermore, Trigen's claim that the Court of Appeals did not consider whether Oklahoma had clearly articulated a policy to allow the conduct at issue, pet. 16, is directly contradicted by the text of the opinion. Op. 10a-14a. It was not the Court of Appeals that ignored these questions below – it was Trigen. As the court observed, "Trigen never directly address[ed] OG&E's argument that all of its regulated electricity sales

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[8] In *Cantor*, this Court pointed out that "[t]here is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy." *Id.* at 596.

are protected by the state action doctrine." Op. 10a. Nor does Trigen's petition ever "directly address" the Court of Appeals' stated reasons for its holdings. This Court should reject Trigen's attempts to employ linguistic machinations to obtain further judicial review.

D. The Court Of Appeals Correctly Followed *Omni Outdoor.*

Trigen's petition is sprinkled with accusations of purported "improper payments" and "undue influence" over Oklahoma City Council members and Oklahoma County Commissioners.[9] These charges reflect an improper double standard. Trigen likewise engages in lobbying and marketing of the City Council and County Commission. Trigen's theory of "undue influence" also is implausible: OG&E did not get the Oklahoma County business, and the Oklahoma City Council acted in accordance with the recommendations of its staff. Even more importantly, the charges are legally irrelevant to a Sherman Act case.

The Court of Appeals correctly "construe[d] Trigen as arguing that OG&E's alleged 'bad acts' somehow destroy OG&E's state action immunity." Op. 11a. The

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[9] The "predatory" conduct upon which Trigen relies included distributing boxes of candy during the Christmas holidays, inviting City and County officials to luncheons, dinners and golf outings, and entertaining City and County officials at out-of-town business conferences and events. These activities, reasonably construed, did not constitute "political corruption" or "predatory conduct," as Trigen argued to the jury. Rather, they were marketing and sales efforts to educate potential customers regarding the benefits of OG&E's product and services, and were, therefore, procompetitive. While casting stones at OG&E, Trigen conveniently ignores the fact that it regularly engaged in similar marketing and sales activities, including hiring former City councilman Pete White (for $500,000), to lobby the City and County, making campaign contributions to County officials, buying City employees lunches, and entertaining City and County officials.

court rejected this contention, noting that "[w]e can find no legal authority, and Trigen points us to none" to support Trigen's argument. *Id.* That is because there is no such legal authority. On the contrary, as the Court of Appeals noted, this Court held in *City of Columbia v. Omni Outdoor* that there are no "corruption," "conspiracy," or "bribery" exceptions to state action (or *Noerr-Pennington*) immunity. 499 U.S. at 378-79.[10] "To use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles of good government. But the statute we are construing [the Sherman Act] is not directed to that end." *Id.* at 378. Trigen's petition does not raise any important question concerning this settled area of antitrust law.

E. Because OG&E Acted With The City And County, OG&E's Activities Also Were Entitled To State Action Immunity Under The Less Stringent *Town Of Hallie* Standard.

State action immunity is proper here for reasons in addition to those stated by the Court of Appeals. Two of the three competitive incidents in this case involved direct participation by the City and County: it was the decision of the City to buy OG&E's electricity to cool the Myriad, and the County's decision to demand lower prices for Trigen to cool the County jail that resulted in the "damages" that Trigen claims. Trigen sued OG&E rather than Oklahoma City and Oklahoma County to recover the "damages" caused by the decisions of the

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[10] In *Omni Outdoor*, this Court analogized the scope of the States' immunity required under *Parker* to the scope of judicial immunity. *See Omni*, 449 U.S. at 372 (citing *Stump v. Sparkman*, 435 U.S. 349 (1978)). In *Stump*, this Court held that "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in 'clear absence of all jurisdiction.' " 435 U.S. at 357.

City and the County. Such a suit is essentially an attempt to veto government action by suing the private party rather than the governmental actors.

The actions of the City and the County in making these purchasing decisions were taken pursuant to State authorization.[11] These decisions of subsidiary political entities are immune from federal antitrust scrutiny without a showing of "active supervision" by the state, as otherwise required under the second prong of *Midcal*. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985). Because it acted jointly with these public bodies, OG&E shares in their immunity. Otherwise, the state action immunity which extends to the City and County would be destroyed. *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 57 (1985) ("We decline to reduce *Parker's* holding to a formalism that would stand for little more than the proposition that Porter Brown sued the wrong parties").

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[11] Oklahoma has clearly articulated a policy of removing local governmental property management decisions from the competitive marketplace. Oklahoma statutes empower cities and counties to make such decisions on the basis of "best interests" standards, rather than on the basis of competitive standards such as price and quality. 11 Okla.Stat. § 22-101 (city property), § 22-124 (commercial redevelopment projects); 19 Okla.Stat. § 1 (county property), § 734 (county jails). *Omni Outdoor* noted, without deciding, that there might be a market-participant exception to *Parker*. 499 U.S. at 374-75. However, every Circuit to consider this issue has determined that there is no such exception. *See, e.g., Allright Colorado, Inc. v. Denver*, 937 F.2d 1502, 1510 & n.11 (10th Cir. 1991); *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems*, 155 F.3d 59, 80-81 (2d Cir. 1998). This is, of course, consistent with this Court's *Noerr-Pennington* jurisprudence. *See, e.g., United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (finding immune petitions to Tennessee Valley Authority to purchase coal). In any event, this issue is not presented by the decision below.

II. Because There Are Numerous Other Grounds On Which The Court Would Affirm In Any Event, The Question Presented By The Petition Is Largely Academic.

The record reflects numerous grounds that required reversal of the jury's verdict. The Court of Appeals did not need to reach most of those grounds expressly. However, the court did address several key elements of these other grounds. The Court of Appeals' assessment of those elements demonstrates that Trigen's antitrust case is doomed regardless of the outcome of the state action inquiry – thus rendering that inquiry largely academic. Even if Trigen's petition presented an important question concerning the state action doctrine (which it does not), resolution of that question should await a case where there may be an otherwise viable antitrust claim.

A. OG&E's Attempts To Persuade The City And County To Purchase Electricity Are Immunized By The *Noerr-Pennington* Doctrine.

The Oklahoma City Council decided to install electric chillers at the Myriad Convention Center. The Oklahoma County Commission decided to demand lower prices for the County Jail and Complex. It cannot be a violation of the Sherman Act for OG&E to have urged the City Council and the County Commission to make decisions favorable to OG&E. "*Noerr* shields from the Sherman Act a concerted effort to influence officials regardless of intent or purpose." *Omni Outdoor*, 499 U.S. at 380 (quoting *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) (citing *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961))). As this Court explained in *Omni Outdoor*: "*Parker* and *Noerr* generally present two faces of the same coin." 499 U.S. at 383.

OG&E lobbied and marketed to the City and County at events, meals and public meetings, and hired consultants. Likewise, Trigen lobbied, marketed and hired consultants. *See supra* n.9 at 18. Trigen argued that OG&E's

marketing efforts and lobbying were not immune because they were made to "improper[ly] influence" the City and County. Such attempts to influence government decision-making, however, fall squarely within *Noerr-Pennington* protection. This Court resoundingly rejected an argument similar to Trigen's in *Omni Outdoor*, finding that "[t]here is no such conspiracy exception." 499 U.S. at 374. *See also Armstrong Surgical Center v. Armstrong County Memorial Hospital*, 185 F.3d 154, 156, 160, 162-63 (3d Cir. 1999), *cert. denied*, 520 U.S. 1261 (2000) (no antitrust liability for injury caused by state action "even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process."). Under *Omni Outdoor*, *Noerr*, and *Pennington*, all of OG&E's – and Trigen's – efforts to persuade the City and County are protected, and do not violate the Sherman Act.

B. OG&E's Use Of The RTP Tariffs Is Protected By The Filed-Rate Doctrine.

Trigen's claim concerning the City turns entirely on OG&E's offer to the City of the experimental RTP rate. That rate was contained in two tariffs filed with and approved by the OCC. The RTP tariffs expressly direct OG&E to select the limited number of participants to enroll in the RTP pilot program. *See* App. B at b-1. The filed rate doctrine bars Trigen from bringing an antitrust suit challenging the implementation of any of the terms of those tariffs, including OG&E's inclusion of the City in that program. *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998); *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922).

The filed-rate doctrine prohibits civil suits challenging the terms of a tariff filed with a regulatory agency. Justice Brandeis explained in *Keogh*: "[L]egal rights . . . in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, *for all purposes*, the legal rate. . . . The rights as defined by

the tariff cannot be varied or enlarged by either contract or tort. . . . " 260 U.S. at 163 (emphasis added). Otherwise, the courts would be usurping the exclusive authority of state or federal regulatory agencies. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-58 (1981). The doctrine bars Sherman Act suits, *Keogh*, and all state law claims challenging a tariff. *Arkansas Louisiana Gas*.

Trigen's assertion that OG&E's consultants were wrong in their estimate of the price the City would pay under the RTP tariffs is irrelevant. The filed-rate doctrine bars any suit based on incorrect estimates of a tariffed service, "even if a carrier intentionally misrepresents its rate." *Central Office*, 524 U.S. at 222, 225. Because OG&E's selection of the City to participate in the experimental RTP tariffs simply implemented express terms in filed tariffs, the filed-rate doctrine bars Trigen's challenge to that selection. *Id.* at 223.

C. Trigen Failed To Establish The Basic Elements Of A Sherman Act Section 2 Claim.

The Court of Appeals' decision also shows that Trigen failed to establish the most basic elements of an unlawful monopolization claim under Section 2 of the Sherman Act: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Trigen could not prove unlawful monopolization because it did not define a reasonable product market, and, contrary to the principles articulated in *Grinnell*, it failed to regard the historical and regulatory reasons for OG&E's position in the sale of electricity in Oklahoma City. Furthermore, as the Court of Appeals understood, OG&E's activities were pro-competitive and pro-consumer, because they resulted in lower prices to consumers. Consequently, Trigen could not prove actionable "antitrust injury" as required by

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

1. Trigen Offered An Unreasonable Product Market Definition.

Trigen argued below and in this Court that OG&E was a competitor and an illegal monopolist in the "cooling services market," because OG&E sold the electricity used by cooling equipment. Trigen's product market definition excluded cooling equipment. Instead, Trigen's market was composed only of Trigen's district-cooling and OG&E's electricity, which are not interchangeable without cooling equipment for the electricity to power. Op. 11a.[12] Under Trigen's test, electric utilities would be unlawful monopolists in every market in which electricity is an input, including the market for "toasting bread," the market for "computer services," and the market for "television watching."

The Court of Appeals recognized the unreasonableness of Trigen's position:

> Trigen contends that OG&E is not entitled to state action immunity because OG&E is not participating in the regulated electricity market but in the unregulated cooling services market. We disagree. First, OG&E is selling only one thing – electricity at state-regulated rates. It does *not* sell the electric chillers that are necessary for cooling. According to Trigen's logic, OG&E must be deemed a competitor, and a potential monopolist, in every single product market that uses electricity to the exclusion of

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[12] Trigen implicitly concedes this point, when it states that "a building that uses Trigen for cooling services does not need to install its own electricity-powered air-conditioning plant." Pet. 2. Trigen omitted air conditioning equipment suppliers from its product market in a blatant ploy to increase OG&E's "market share."

> the suppliers of that market. Clearly, this is an unreasonable result.

Op. 11a. Without a legally valid product market, Trigen's monopolization claim must fail. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).[13]

2. Trigen Cannot Show That OG&E "Willfully Acquired Or Maintained" Monopoly Power.

As the Court of Appeals pointed out, the "predatory" activities alleged by Trigen amounted to nothing more than OG&E's marketing and sales efforts to sell additional electricity. Trigen's charges of political corruption (which improperly swayed the jury and should never have been admitted) could not, under *Omni*, amount to the kinds of activities needed to show "willful acquisition or maintenance" of monopoly power. OG&E's "share" of the electric services market in Oklahoma City market is a result of "historic accident" and OCC regulation, so OG&E cannot have unlawful monopoly power. *Grinnell*, 384 U.S. at 570-71. Moreover, OG&E cannot have

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[13] Trigen represents that "the relevant market was the market for cooling services to commercial and governmental buildings . . . , and the jury so found." Pet. 3 n.2, 4, 6. But it is just as likely that the jury found illegal monopolization of the electric services market. Instruction No. 2 told the jury that OG&E has a monopoly in the generation, transmission and distribution of electricity. A.III.465-65. Instruction No. 15 told the jury that the electrical power services market is one of two possible relevant markets. A.III.478-79. Instruction No. 18 told the jury to return a liability verdict if it found OG&E to possess monopoly power in a relevant market. A.III.483-84. These instructions, taken together, essentially amounted to a directed verdict of Section 2 liability for OG&E's *legal* regulated monopoly in the *electric services market* in Oklahoma City. Because there was no special interrogatory regarding the product market and no other way to tell what the jury "found", it is, at the very least, unclear what the jury found with respect to the product market.

"monopoly power" – the power to "profitably raise prices above the competitive level" – because the OCC, not OG&E, sets OG&E's prices. *See United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3107 (U.S. Aug. 7, 2001) (No. 01-236).

3. Trigen Cannot Establish Antitrust Injury.

As the Court of Appeals recognized, the gravamen of Trigen's complaint was that "OG&E's rates are too low and that Trigen either had to lower its own rates in response or lose business." Op. 14a. OG&E's conduct resulted in *lower prices to consumers*. Trigen cannot show antitrust injury because the alleged injury is injury to Trigen as a *competitor* and not injury to *competition*. *Brunswick*, 429 U.S. at 489. As this Court explained in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986), "[t]o hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result."

III. Trigen's Appeals To Policy Are Unpersuasive Because The Court Of Appeals Correctly Applied State Action Immunity, And Its Decision Will Not Affect Ongoing Deregulation.

Trigen's argument that deregulation will somehow be harmed or the States will be compromised if the Tenth Circuit's decision stands is misplaced. The opinion clearly acknowledges that state action antitrust immunity arises only where there is pervasive state regulation and the two-pronged *Midcal* test is satisfied. Indeed, a multitude of antitrust decisions have found unregulated activities of regulated monopolists subject to antitrust scrutiny. *See, e.g., Cantor*, 428 U.S. 579; *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). The Tenth Circuit's opinion does nothing

to change the established standards applied in many cases.

The courts are accustomed to looking at the particular circumstances of each case to consider what activities are and are not regulated, and what activities are and are not immune. That is precisely what the Tenth Circuit's decision instructs lower courts to continue doing. This decision does not alter the way that lower courts will approach cases involving deregulated or partially deregulated industries. The decision will not, as Trigen argues, encourage holders of former franchised monopolies, such as telephone and gas companies, to ride roughshod over potential competitors in unregulated markets.

Traditionally, the electricity industry was largely comprised of vertically integrated, investor-owned electric utilities subject to state regulation. The retail customer had no choice among providers, and the rates, terms, and conditions of delivered electric service were fully regulated by the States. In the past decade, however, a number of States have decided to open the electric generation portion of their retail markets to competition among energy suppliers. As States choose to open their retail electric markets to competition among energy suppliers, the States retain the ultimate right to choose the degree of regulation and the state action antitrust exemption. As all or portions of retail electricity markets are opened to competition, the state action doctrine will have less relevance. However, as long as a State pervasively regulates retail electric service (as Oklahoma does today), the doctrine will remain applicable.

In any event, the trend toward partial deregulation does not come into play here. The events underlying this case occurred entirely under the traditional regime of strict regulation. Furthermore, Oklahoma has delayed opening its retail electricity markets to competition until after a task force issues a report on the effects of deregulation at the end of 2002. Pet. 9 n.8. Whether States continue to deregulate all or portions of the electric utility industry, this case cannot be used as a basis for

determining the future interplay between regulated and unregulated segments of the industry, because this case involves a fully regulated electricity market.

In fact, Trigen advances its "policy" arguments to conceal its effort to change the law. Trigen is trying to put handcuffs on companies like OG&E because they offer franchised public services of the kind that used to be called "natural monopolies". As Judge Diane Wood of the Seventh Circuit recently said in *Goldwasser v. Ameritech Corp.*, "even a monopolist is entitled to compete; it need not lie down and play dead." 222 F.3d 390, 397 (7th Cir. 2000). Trigen brought this suit because Trigen did not want OG&E to offer lower prices to the County, the City and Corporate Tower. It is Trigen's conduct, not OG&E's, that is anticompetitive.

IV. Trigen's State Law Claims Are Not Before This Court.

Trigen suggests by way of a footnote (Pet. 21-22 n.17), that this Court should vacate the Court of Appeals' judgment that the Oklahoma Constitution places Trigen's state law claims within the exclusive jurisdiction of the OCC. That request is misplaced. The state law issue is not within the question presented for *certiorari*, and thus is not before this Court. Sup. Ct. R. 14.1(a). In fact, Trigen concedes that it "does not seek *certiorari* to review the correctness of this decision under Oklahoma law. . . . " Pet. 21 n.17. Moreover, this Court "ordinarily will not consider such a state-law issue." *Wharf (Holdings) Ltd. v. United International Holdings, Inc.*, 121 S.Ct. 1776, 1781-82 (2000).

Nonetheless, as a pretext for seeking *vacatur*, Trigen asserts that the Court of Appeals' decision concerning the OCC's exclusive jurisdiction is "premised upon the error of federal law for which Trigen seeks *certiorari*. . . . " Pet. 21 n.17. Trigen's contention is false. The Court of Appeals

quoted four sections of the Oklahoma Constitution establishing the OCC as a "court of record" with certain exclusive jurisdiction and forbidding collateral attacks upon OCC-approved rates and terms. Op. 14a (quoting Okla.Const. art. IX §§ 18, 19, 20 and 24). As required by *Wilson v. Harlow*, 860 P.2d 793 (Okla. 1993), *cert. denied*, 510 U.S. 1117 (1994), the court then "look[ed] behind the form" in which Trigen's action was brought, to determine whether Trigen's claims were really a collateral attack upon the OCC's rates and terms.[14] Having made such an inquiry into the real nature of Trigen's claims, based upon its own review of the record, the Court of Appeals concluded:

> In this case, in each of the three competitive incidents of which Trigen complains, the heart of Trigen's complaint is that OG&E's rates are too low and that Trigen either had to lower its own rates in response or lose business. The only remedy Trigen seeks is "lost profits" as damages from OG&E. Therefore, we conclude that Trigen's state antitrust and tort claims are in fact collateral attacks on OG&E's filed rates, and that such attacks lie within the exclusive jurisdiction of the OCC.

Op. 14a. Stated differently, the Court of Appeals found that Trigen's state law claims were merely a tactic to complain to the courts about OG&E's OCC-approved rates. The Court of Appeals rejected Trigen's state law claims under the Oklahoma Constitution's delegation of exclusive jurisdiction to the OCC – surely a state law

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[14] Trigen implies that simply because it sought damages, the OCC cannot have jurisdiction. That proposition is demonstrably untrue. In *Wilson v. Harlow*, the plaintiff also sought damages, and the Oklahoma Supreme Court nonetheless looked to the real nature of plaintiff's claim and found the matter within the OCC's exclusive jurisdiction. 860 P.2d at 796.

ground independent of the federal state action immunity doctrine.[15]

CONCLUSION

Trigen's petition raises no issue that merits review by this Court. The petition for *certiorari* should be denied.

Respectfully submitted,

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[15] OG&E's briefs below raised the issue of the OCC's exclusive jurisdiction under the Oklahoma Constitution, giving Trigen the opportunity to argue its position. As the Court of Appeals found, "Trigen never respond[ed] to this argument." Op. 13a n.2.

APPENDIX

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A. Oklahoma Constitutional and Statutory Provisions a-1

Oklahoma Constitution, art. IX § 15 ..... a-1

11 Oklahoma Statutes § 22-101 ..... a-1

11 Oklahoma Statutes § 22-124 ..... a-2

17 Oklahoma Statutes § 151 ..... a-3

19 Oklahoma Statutes § 1 ..... a-4

19 Oklahoma Statutes § 734 ..... a-5

B. Day-Ahead Real Time Pricing ("RTP") Tariff (DX 330) b-1

C. Oklahoma Corporation Commission Final Order approving RTP Tariffs (May 24, 1996) (DX 318) c-1

D. OG&E's "Plan of Action" (PX 164) d-1

APPENDIX A

OKLAHOMA CONSTITUTIONAL AND STATUTORY PROVISIONS

OKLAHOMA CONSTITUTION

Oklahoma Constitution art. IX §15

Creation – Terms of office – Vacancies

A Corporation Commission is hereby created, to be composed of three persons, who shall be elected by the people at a general election for State officers, and their terms of office shall be six years. . . . In case of a vacancy in said office, the Governor of the State shall fill such vacancy by appointment until the next general election, when a successor shall be elected to fill out any unexpired term.

OKLAHOMA STATUTES

11 Oklahoma Statutes §22-101

Corporate Powers of Municipalities

All incorporated municipalities shall be bodies corporate and politic, and shall have the powers to:

1. Sue and be sued;

2. Purchase and hold real and personal property for the use of the municipality;

3. Sell and convey any real or personal property owned by the municipality and make orders respecting the same as may be conducive to the best interests of the municipality;

4. Make all contracts and do all other acts in relation to the property and affairs of the municipality, necessary to the good government of the municipality, and to the exercise of its corporate and administrative powers; and

5. Exercise such other powers as are or may be conferred by law.

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11 Oklahoma Statutes §22-124

Market Places – Municipal Buildings

The municipal governing body may purchase ground for, erect, establish, operate, and regulate retail or commercial redevelopment projects, market houses, and marketplaces. The governing body may contract with any person, company, or corporation for the erection, operation, and maintenance of such redevelopment projects, market houses, and marketplaces on terms and conditions and in such manner as may be necessary and proper pursuant to the authority granted to it by the Constitution and laws of this state to protect and preserve such projects and markets for the benefit of the municipality and its citizens. The municipal governing body may raise all necessary revenue therefor. The governing body may also provide for the erection and operation of any and all necessary buildings for the municipality.

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17 Oklahoma Statutes §151

Public Utility Defined – Exemption of Nonprofit Water and Sewer Corporations – Washington County – Authority of Certain Beneficiaries to Condemn Property

The term "public utility" as used in Sections 151 through 155 of this title, shall be taken to mean and include every corporation, association, company, individuals, their trustees, lessees, or receivers, successors or assigns, except as hereinafter provided, and except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public:

(a) For the conveyance of gas by pipeline.

(b) For the production, transmission, delivery or furnishing of heat or light with gas.

(c) For the production, transmission, delivery or furnishing electric current for light, heat or power.

(d) For the transportation, delivery or furnishing of water for domestic purposes or for power. . . .

The term "Commission" shall be taken to mean Corporation Commission of Oklahoma.

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19 Oklahoma Statutes §1

Organized Counties to be Empowered for the Following Purposes

Each organized county within the state shall be a body corporate and politic and as such shall be empowered for the following purposes:

1. To sue and be sued;

2. To purchase and hold real and personal estate for the use of the county, and lands sold for taxes as provided by law;

3. To sell and convey any real or personal estate owned by the county, and make such order respecting the same as may be deemed conducive to the interests of the inhabitants;

4. To execute leases of real property owned by the county to nonprofit corporations organized for the general purpose of historical preservation;

5. To make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of corporate or administrative power; and

6. To exercise such other and further powers as may be especially provided for by law.

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19 Oklahoma Statutes §734

Contracts to Acquire Sites, Purchase, Erect, Repair, Remodel, Equip or Furnish – Bonds – Elections

Whenever the board of county commissioners of any county considers it to be to the best interest of the county to acquire sites, purchase, erect, repair, remodel, equip and furnish a courthouse or jail, they shall have power to contract for the acquisition of sites, purchase, erection, repair, remodeling, equipping and furnishing of same and to issue bonds in payment therefor. . . .

APPENDIX B

Defendant's Exhibit 330

OG&E ELECTRIC SERVICES SHEET NO. 65.0
P.O. Box 321 DATE ISSUED 6-12-96
Oklahoma City, Oklahoma 73101

STANDARD PRICING SCHEDULE: DAP
STATE OF OKLAHOMA
DAY-AHEAD PRICING Code No. 20

Service Territory

Service under this tariff is available in all territories served by OG&E Electric Services (Company), which are within the Oklahoma Corporation Commission's (Commission) jurisdiction.

Availability

This tariff is available to customers who are selected by the Company to participate in the Company's Day-Ahead Pricing (DAP) program and who execute a written contract for such service, including customers taking service under the Company's Rider for Load Curtailment (Curtailment Customers).

This tariff is offered as part of a pilot program, and the pilot program is scheduled for a minimum of two years, with individual customer participation in the pilot program not to exceed four years.

The Company's Rules, Regulations, and Conditions of Service and the Commission's Rules and Regulations apply to service provided under this tariff. This tariff is not available for resale, stand-by, breakdown, or auxiliary service.

Service Type

The Company will provide single or three phase service delivered at approximately 60 hertz. The Company shall determine the appropriate voltage(s) for delivery to the customers' premises.

Service Termination

A customer may cancel service under this tariff and return to another tariff schedule upon giving 30 days written notice. If the thirtieth day of the notice period does not fall on the last day of the billing month, service will continue under this schedule through the next billing period. A customer may return to another tariff schedule without penalty, and with the same billing determinants (including elapsed time on the billing demand ratchet) which existed prior to taking service under this tariff. Consumption under this tariff will not affect a customer's billing determinants for other tariff schedules.

If a customer terminates service under this tariff, the customer will not be eligible to receive service under this tariff until the greater of: (1) two years from termination date or (2) the start of the permanent program.

Bill and Hourly Pricing Methodology

The customer's bill under this tariff will consist of two parts: (1) the Standard Bill component and (2) the hourly Price component. The Standard Bill component will be determined by multiplying the Customer's Base

Line (CBL) billing determinants by the customer's standard tariff rate(s). The hourly Price component will be the sum over all hours of the difference between each hour's actual kilowatt-hour use and the CBL kilowatt-hour use multiplied by the respective hourly Day-Ahead Price. The hourly Day-Ahead Prices will be based on the Company's projections of hourly incremental operating, outage, generation, transmission, and distribution costs, including provisions for losses by service level and a Risk and Recovery Factor.

Load Curtailment

For Curtailment Customers, during curtailments, use above the Contracted Demand will be billed at an hourly price that reflects the market price for Emergency Power and Energy (adjusted for line losses plus 6 mills per kilowatt-hour), if such power and energy are available.

If Emergency Power and Energy are unavailable during curtailment periods, the Company shall notify Curtailment Customers that they must reduce consumption to their Contracted Demand. If a Curtailment Customer fails to reduce consumption to the Contracted Demand when notified of such a requirement, the Curtailment Customer may be denied further service under this tariff and the Rider for Load Curtailment.

Pricing Periods

Each hour is a pricing period, and the corresponding quoted hourly price is applicable to all kilowatt-hours taken during that hour. The daily pricing periods for DAP

begin with the hour-ending 0100 and end with the hour-ending 2400.

Price Notice

By a method specified by the Company and by 4:00 p.m. each day (Monday through Friday), the Company will make available to Day-Ahead Pricing customers the hourly prices which shall be effective for the following day. The customer will be responsible for obtaining the necessary equipment to receive Day-Ahead Prices (e.g. telephone, modem, telecopier, or computer). Except during high-risk-outage periods, the Company will make prices available for Saturday through Monday on the previous Friday. More than day-ahead pricing may also be used for the following holidays: New Years Day, Martin Luther King Day, Presidents Day, Memorial Day, Fourth of July, Labor Day, Veterans' Day, Thanksgiving (Thursday and Friday), and Christmas (including Christmas Eve Day). Under high-outage-risk circumstances, the Company may not be able to project prices more than one day in advance, and the Company reserves the right to update prices on a one-day-ahead basis. If, on certain occasions, a customer is unable to receive the Day-Ahead Prices in the manner specified by the Company, the customer shall inform the Company so that prices may be provided.

Curtailment Notice

The Company will provide curtailment notices to Curtailment Customers at least 30 minutes before curtailments will begin. At the time the Company provides the curtailment notice, the Company will also notify Curtailment Customers if Emergency Power and Energy are available and the hourly prices that will be effective during the curtailment period for incremental or decremental use from the Contracted Demand.

Price Reduction Subsequent to Price Notification

Subsequent to providing hourly prices by 4:00 p.m. of the day before the prices are effective, the Company may decrease its Day-Ahead Prices. The Company shall notify customers of such change in prices as soon as is practicable.

Confidentiality

Any customer taking service under this tariff shall not disclose to any person, entity, or organization any information regarding the pricing, including, but not limited to, the hourly prices offered under this tariff, without the prior written consent of the Company. Disclosure of such information, including failure to obtain prior written consent before providing such information to Consultant(s) (individuals or entities providing energy use and purchase analysis assistance to the customer) shall result in a material breach of any agreement between such customer and the Company, for which the Company shall

be entitled to recover at law and at equity. Such disclosure shall at the Company's sole option, result in suspension of service under this tariff, with a full reimbursement to the Company by the customer of the difference between the applicable standard tariff rates and the rate(s) provided pursuant to this tariff for all use billed pursuant to this tariff.

Customer Baseline Load

For existing customers, the Customer Baseline Load (CBL) shall be 12 consecutive months of customer-specific, historic, hourly load information. For new customers, the CBL shall be 12 consecutive months of hourly load information which best represents a customer's typical or expected electricity consumption level and pattern. Acceptance of the CBL is a precondition for eligibility for this tariff.

For Curtailment Customers, during curtailment hours, the CBL will be the Curtailment Customer's Contracted Demand, which shall be the Contracted Demand agreed to under the Rider for Load Curtailment.

Standard Bill

The Standard Bill is calculated by applying the appropriate non-Day-Ahead Pricing tariff and the Fuel Cost Adjustment (FCA) charge to a customer's CBL billing determinants for each month of the year (exclusive of taxes and franchise fees). If base rates or the FCA are subsequently revised, those changes will be reflected in

the customer's Standard Bill based on their CBL billing determinants for a given month.

As required by the Company's Terms and Conditions of Service, customers taking service under this tariff may be required to make a one time contribution or pay a monthly facilities charge sufficient to cover the cost of transmission and distribution facilities provided by the Company to accommodate the customer's load.

Bill Determination

A bill under this tariff is rendered after each monthly billing period and consists of a Standard Bill amount and a charge (or credit) for incremental (or decremental) energy use based on the difference between a customer's actual use and the customer's CBL in each hour multiplied by the respective hourly energy price provided during the billing period. The monthly bill under this tariff is calculated using the following formula:

$$\text{DAP Bill}_{Mo} = \text{Standard Bill}_{Mo} + \Sigma\,[\text{Price}_{Hr} \times (\text{Load}_{Hr} - \text{CBL}_{Hr})] + \text{Administrative Charge}$$

Where:

DAP Bill_{Mo} = Customer's bill for service under this option in a specific billing month

$\text{Standard Bill}_{Mo}$ = Customer's bill for a specific month on use as defined by the CBL and billed under the standard tariff inclusive of Fuel Cost Adjustment and exclusive of franchise fees and taxes

Σ = Sum over all hours of the monthly billing period

$Load_{Hr}$ = Customer's actual kilowatt-hours use in an hour

CBL_{Hr} = Customer Baseline Load in an hour

$Price_{Hr}$ = Hourly DAP price based on the Company's Hourly marginal or incremental costs and standard tariff prices. $Price_{Hr}$ shall never be less than $.015 per kilowatt-hour:

$[(RRF \times MC_{Hr}) \times LAF] + [(1 - RRF) \times STD_{Price}]$

Where:

MC_{Hr} = the marginal operating, generation, transmission, distribution costs for the hour

*For Curtailment Customers, during curtailment periods, for use above the Contracted Demand when Emergency Power and Energy are available, the Marginal Cost will reflect the current market price for Emergency Power and Energy, as adjusted.

RRF = The Risk and Recovery Factor (between .5 and 1)

LAF = Loss Adjustment Factor for the appropriate Service Level:

Level 1	1.02315
Level 2	1.02726
Level 3	1.03499
Level 4	1.04150
Level 5	1.05320

STD_{Price} = Average pricing for each pricing period under the standard tariff

Fuel Cost Adjustment

Hourly kilowatt-hour use above the hourly CBL kilowatt-hour use shall not be subject to the Rider for Fuel Cost Adjustment.

Administrative Charge

To cover the billing, administrative, and communication costs associated with this service, an Administrative Charge of either $200 or $275 per month will be charged. Customers who choose the $275 per month Administrative Charge will receive a loaned personal computer, printer, and modem for receiving Day-Ahead Prices.

Meter Communication Link Requirement

For meter reading, the Company requires the use of a telephone line or other communication link deemed acceptable by the Company. The customer must provide the line as well as Company access to the line.

Power Factor Clause

In applying the standard tariff Power Factor Clause for the Standard Bill portion of the monthly bill calculation, the Average Power Factor will be based on *total* monthly consumption. The customer's standard tariff Power Factor Clause provisions will apply in all other respects.

Franchise Payment

The above stated rates do not include any amount for franchise payments levied upon the Company by a municipality. When a municipality, by a franchise or other ordinance, levies or imposes upon the Company franchise payments or fees (based on a percent of gross revenues) to be paid by the Company to the municipality, such franchise payment will be added as a percentage of charges for electric service to the bills of all customers receiving service from the Company within the corporate limits of the municipality exacting said payment.

Annual Public Utility Assessment Fee

The Standard Bill calculation will include a charge levied pursuant to the Rider for Annual Public Utility Assessment Fee.

Late Payment Charge

A late payment charge in an amount equal to 1.5 percent of the total balance for services and charges remaining unpaid on the due date stated on the bill shall be added to the amount due. The due date as stated on the bill shall be 20 days after the bill is mailed.

Effective 28 June 1996

Rates Authorized

By	402103	960000005	24 May 1996
	(Order No.)	(Cause/Docket No.)	(Date of Order)

APPENDIX C

Defendant's Exhibit 318

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICATION OF OKLAHOMA GAS AND ELECTRIC COMPANY FOR APPROVAL OF DAY-AHEAD AND WEEK-AHEAD PRICING TARIFFS	)))))))	CAUSE NO. PUD 960000005 ORDER NO. 402103

Hearing: April 4, 1996, before Robert E. Goldfield, Administrative Law Judge

Appearances: Diane Goldschmidt and F. D. Binns, Jr., Attorneys for Oklahoma Gas and Electric Company;

Rick D. Chamberlain and Mickey S. Moon, Assistant Attorneys General, Attorneys for the Office of the Attorney General of the State of Oklahoma; and

Jacqueline T. Miller, Assistant General Counsel, Public Utility Division of the Oklahoma Corporation Commission.

FINAL ORDER

BY THE COMMISSION:

The Oklahoma Corporation Commission of the State of Oklahoma being regularly in session and the undersigned Commissioners being present and participating,

there comes on for consideration and action, the above Cause for an order by the Commission.

SUMMARY OF EVIDENCE

Testimony of William L. Wylie Manager of the Costing and Pricing Department of Oklahoma Gas and Electric Company was prefiled and adopted by the witness, Mr. Wylie. Mr. Wylie explained real time pricing and why OG&E needed to implement it, which includes, among other things, customers' requests for the service and introduction of marginal pricing techniques into the market place and the fact that it is a load management tool. Mr. Wylie described the methods used in the components of the bill and the format which includes a Day-Ahead as well as Week-Ahead pricing tariff; and that the tariff is a pilot program and by its term contained certain time limitations. He described the "bill on hourly pricing methodology"; the "price notice" provisions of the tariff; and the customer confidentiality clause. Mr. Wylie discussed the application of the fuel adjustment clause under the tariff and the administrative charge proposed. That OG&E proposed both Day-Ahead and Week-Ahead tariffs in order to provide customer choice and recognition by customers of varying prices of electricity. An explanation was provided by Mr. Wylie as to the pricing provisions and Mr. Wylie requested that the Day-Ahead pricing tariff, and Week-Ahead pricing tariff be approved and that modification to the rider for fuel cost adjustments be likewise approved.

David W. Brammer, Tariff and Cost of Service Coordinator for the Oklahoma Corporation Commission Public Utilities Division, prefiled testimony in this cause, which testimony was adopted by Mr. Brammer. Mr. Brammer testified concerning the Day-Ahead pricing and how it would be used; the fact that a customer could reduce energy costs and that economic benefits would result to the customer as well as benefits to OG&E to encourage load growth at the proper time. Mr. Brammer further testified that the Commission has approved a pilot program very much like the one being considered here in Public Service Company of Oklahoma's real time pricing tariff application, Cause PUD940000301, Order No. 382997, dated April 28, 1994. Mr. Brammer described the elements of the proposed Day-Ahead pricing and Week-Ahead pricing by OG&E and that staff did not oppose adoption of the Day-Ahead and Week-Ahead pricing tariffs as filed. Mr. Brammer additionally testified that this tariff may be amended by agreement of the parties or through a hearing upon proper notice by any party to the cause.

Additionally Mr. Brammer testified that certain reporting requirements should be imposed upon OG&E which include:

1. Each participating Day-Ahead and Week-Ahead customer's historical consumption and the monthly CBL;

2. Each participating customers usage while participating in the program;

3. Forecast hourly energy price versus actual energy price;

4. Actual monthly usage of non-participating customers identified by customer class;

5. Calculations and methodologies utilized by OG&E to calculate the hourly energy prices at randomly selected intervals; and

6. Copies of any OG&E analysis o! the Day-Ahead and Week-Ahead Pricing program.

After taking into account the testimony of the witnesses and reviewing the Application with attachments filed by Oklahoma Gas and Electric Company, the Corporation Commission of Oklahoma finds that the Day-Ahead and Week-Ahead Pricing Tariffs should be approved.

FINDINGS

The Commission finds that it has jurisdiction over this matter by virtue of Article IX, § 18 of the Oklahoma Constitution, Title 17 Oklahoma Statutes § 151 et seq., as well as OAC 165:35 et seq., known as the General Rules and Regulations Governing Electric Utilities.

The Commission further finds that due and proper notice has been given for the hearing of this Application. On January 3, 1996, Oklahoma Gas and Electric Company ("OG&E") requested approval of Day-Ahead Pricing and Week-Ahead Pricing tariffs as part of a pilot program to (1) provide customers with price signals which will result in more efficient use of generation resources, and (2) gauge its customers' responsiveness to hourly pricing to the economic benefit of both parties. Enrollment in OG&E's pilot program is scheduled to last for two years, with individual participation in the pilot program not to

exceed four years. That the tariffs are a part of an experimental program and the provisions of OAC 165:35-19-2 and OAC 165:35-5-1(a) and (c) shall not apply to those tariffs. Copies of the proposed tariffs were attached to the Application. On April 4, 1996, a hearing was held before the Administrative Law Judge in which OG&E requested approval of the Day-Ahead and Week-Ahead Pricing Tariffs.

The Commission further finds that the proposed Day-Ahead and Week-Ahead Pricing Tariffs will not result in unjust or undue discrimination.

The commission further finds that a modification of the rider for fuel cost adjustment should be as follows: Hourly kilowatt-hour use above the hourly CBL kilowatt-hour use shall not be subject to the Rider for Fuel Cost Adjustment. In all other respects, the fuel adjustment clause approved by Order No. 380443 in Cause No. PUD001055 shall continue as set forth in the Order.

The Commission further finds that the Day-Ahead and Week-Ahead Pricing Tariffs should be and are hereby approved, incorporating the recommendations of the Administrative Law Judge herein.

ORDER

The Commission orders that the Day-Ahead and Week-Ahead Pricing Tariffs are part of a pilot program, and that the provisions of OAC 165:35-19-2 and OAC 165:35-5-1(a) and (c) are hereby waived to the Day-Ahead and Week-Ahead tariffs.

It is further ordered that Oklahoma Gas and Electric Company shall provide the information and reporting requirements to the Public Utilities Division, as set forth herein. That the information and reporting requirements shall be subject to Order No. 399010, Cause No. PUD 960000005, dated January 29, 1996.

It is further ordered that the fuel adjustment clause approved by Order No. 380443 in Cause No. PUD001055 shall continue as set forth in that Order, except same shall be modified as follows:

Hourly kilowatt-hour use above the hourly CBL kilowatt-hour use shall not be subject to the Rider for Feel Cost Adjustment.

It is further ordered that the Day-Ahead and Week Ahead Pricing Tariffs shall be effective upon approval by the Director of Public Utilities; it is further ordered that any future revisions to the tariff which the parties to this cause may agree upon may become effective after approval by the Director of Public Utilities as set forth in Mr. Brammer's testimony on page three (3) of this Order.

IT IS THEREFORE THE ORDER OF THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA that the Day-Ahead and Week-Ahead Pricing Tariffs are hereby approved.

CORPORATION COMMISSION OF OKLAHOMA

/s/ Cody L. Graves
CODY L. GRAVES, Chairman

/s/ Bob Anthony
BOB ANTHONY, Vice Chairman

/s/ Ed Apple
ED APPLE, Commissioner

DONE AND PERFORMED this 24 day of May, 1996.

BY THE ORDER OF THE COMMISSION:

/s/ Charlotte W. Flanagan
CHARLOTTE W. FLANAGAN, Secretary

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The foregoing findings and Order are the Report and Recommendations of the Administrative Law Judge.

/s/ Robert E. Goldfield
Robert E. Goldfield
Administrative Law Judge

May 23, 1996
Date

APPENDIX D

Plaintiff's Exhibit 164

Randy Warren
1/26/93

TRIGEN
A Plan of Action

To remove customers from Trigen:

* Continue to work on educating our customers about the inefficiencies of Trigen.

* Continue to work on creative ideas such as guarantees, loans, and lease/purchases, benefiting both OG&E and our customers.

* Establish a good rapport with a few select mechanical engineers keeping these engineers educated on the way Trigen does business.

* Prepare a rate comparison between existing Trigen customers. This will let our customers see how their rates compare with others.

* Schedule occasional breakfast meetings with existing Trigen customers.

* Invite former customers/engineers from Tulsa to explain why Trigen was discontinued.

* Keep existing Trigen customers apprised as to when their contracts expire.

* Have the Legal Department review contracts, for possible way out.

* Develop and organize a file of all Trigen customers complete with Trigen's contract and some of the billings.

* Meet on regular basis with commercial marketing group to discuss new and innovative ways to help our customers switch to electric chillers.

How do we retain existing customers:

* Continue to educate customers about Trigen.
* Get cooling facilities upgraded as they get old, this will create an exit barrier.
* Continue a good working relationship with these customers.
* Develop creative financing ideas to help customer attain new equipment. Ideas such as guarantees, loans, lease/purchases.